

Message Text

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C O N F I D E N T I A L SECTION 1 OF 2 BERLIN 5197

E.O. 11652 GDS

TAGS: PFOR, PDIP, CGEN, GE, GW, US

SUBJECT: US-GDR CONSULAR NEGOTIATIONS: COMMENTS ON
INTERESTS, ISSUES, OPTIONS AND TACTICS

REF: (A) STATE 012391; (B) STATE 007052 (NOTAL)

(C) STATE 024584

1. SUMMARY: THIS MESSAGE OFFERS OUR VIEWS ON THE GDR
AND U.S. DRAFT CONSULAR CONVENTIONS, THE SETTING AS
SEEN FROM BERLIN, U.S. AND GDR INTERESTS, THE
IMPORTANT ISSUES (OTHER THAN NATIONALITY WHICH HAS
BEEN DEALT WITH IN BERLIN 5191), TACTICAL CHOICES
AND, FINALLY, SOME SUGGESTIONS ON HOW TO PROCEED.
THESE COMMENTS ARE SUBMITTED WITHOUT BENEFIT OF ALL
OF THE RELEVANT DOCUMENTATION AND WITHOUT EXPERT
KNOWLEDGE OF INTERNATIONAL AND CONSULAR LAW. END
SUMMARY.

2. THE SETTING-
THE GDR'S ENTRY ON THE INTERNATIONAL SCENE AS A FULL-
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FLEDGED STATE IS BEST PERCEIVED BY RECALLING THAT IN

EARLY 1973 APPROXIMATELY 25 COUNTRIES, PRINCIPALLY SOCIALIST, RECOGNIZED THE GDR. NOW, TWO YEARS LATER, MORE THAN 110 COUNTRIES HAVE RECOGNIZED THE GDR, AND SOME 65 EMBASSIES HAVE BEEN ESTABLISHED IN BERLIN. THE GDR IS THUS A STATE RECOGNIZED BY MOST OF THE WORLD--AND THE REGIME GREATLY VALUES THIS STATUS. CURRENT GDR INTERNATIONAL ASPIRATIONS SEEM PRINCIPALLY AIMED AT NAILING DOWN NEW FOUND RESPECTABILITY AND AUTHENTICITY, AND BECOMING WHAT THE GERMANS CALL "SALONFAEHIG" -- ACCEPTABLE IN THE DRAWING ROOM.

WHEN THE U.S. RECOGNIZED THE GDR AND ESTABLISHED DIPLOMATIC RELATIONS WITH IT, WE TOO ACKNOWLEDGED ITS LEGITIMACY. THIS HAS IMPLICATIONS FOR US WHICH FORCE US TO ALTER SOME OF PRECONCEIVED AND LONG-HELD NOTIONS ABOUT "THE GDR". WE ARE NOW READY TO DEAL WITH THE GDR IN GOOD FAITH, AND WITH A VIEW TOWARD SUCCEEDING, AS WE ENTER INTO THE CONSULAR NEGOTIATIONS THEY HAVE REQUESTED.

3. U.S. OBJECTIVES

OUR INTERESTS IN THESE NEGOTIATIONS LIE ALONG POLITICAL AND CONSULAR LINES.

IN COMMON WITH THE GDR, WE SEEK TO ESTABLISH A SOUND, LEGALLY CORRECT BASIS FOR CONDUCTING OUR CONSULAR RELATIONS. WE ARE ENGAGED IN A MEASURED PROCESS OF NORMALIZING OUR RELATIONS WITH THE GDR. THE TIES WE BUILD TEND TO ENFORCE STABILITY IN OUR BILATERAL RELATIONS. THEY ALSO SUPPORT, IN THEIR LIMITED WAY, A BROADER POLICY OF DETENTE.

ON OUR SIDE, WE WISH TO DO NOTHING TO DIMINISH OUR SUPPORT OF THE FRG. CONCERNING THE QUESTION OF NATIONALITY, MOREOVER, WHICH HAS SUCH SPECIAL POLITICAL SIGNIFICANCE TO THE GDR, WE SHOULD ALSO DO NOTHING INCOMPATIBLE WITH U.S. LAW AND PRACTICE.

ON THE CONSULAR SIDE, THE EMBASSY ESTIMATES THAT
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ITS ROUTINE OPERATIONS WILL HAVE GROWN CONSIDERABLY BY JULY 1, 1975: 500 NON-IMMIGRANT VISAS, 75 ACTIVE IMMIGRANT VISA CASES, 100 ACTIVE PROTECTION/WELFARE/HUMANITARIAN CASES, 75 PASSPORT AND CITIZENSHIP CASES AND ABOUT 225 NOTARIAL AND MISCELLANEOUS MATTERS. OUR WORKLOAD WILL EXPAND STILL FURTHER THROUGH THE REST OF THE YEAR. CONSULAR RIGHTS AND PROCEDURES SHOULD IF POSSIBLE BE MORE PRECISELY ESTABLISHED, PARTICULARLY

IN THE AREAS OF DAUL NATIONALITY AND
CONSULAR ACCESS. WE ARE NOW PROCEEDING UNDER THE
MORE GENERAL RUBRIC OF THE VIENNA CONVENTION, WHICH
LACKS BILATERAL SPECIFICITY.

4. GDR OBJECTIVES

BEYOND OUR COMMON OBJECTIVES IN THESE NEGOTIATIONS NOTED
ABOVE, THE GDR HAS SOME GOALS OF ITS OWN. WITH SOVIET
SUPPORT, THIS REGIME SEEKS TO BUILD UPON AND EXPAND
THE LEGITIMACY OF THE GDR AND ITS ACCEPTANCE AS A
SEPARATE GERMAN STATE. IT DOES THIS, IN PART, BY
ACCOMMULATING INTERNATIONAL AGREEMENTS, TREATIES, ETC.,
JUST AS IN EARLIER YEARS IT GATHERED IN LETTERS OF
CREDENCE FROM FOREIGN AMBASSADORS.

MORE SPECIFICALLY, THE GDR IS CONSCIOUS THAT THE
CONSULAR CONVENTION WILL BE THE FIRST REAL PIECE OF
BUSINESS IN OUR RELATIONS SINCE RECOGNITION. IT WILL
SEEK TO DEMONSTRATE THAT IT IS A FIT NEGOTIATING
PARTNER FOR THE U.S. THE GDR WILL PUSH FOR ITS
DEFINITION OF NATIONALITY, RECOGNIZING THE POLITICAL
IMPLICATIONS OF THIS ISSUE IN THE CONTEXT OF THE LARGER
GERMAN QUESTION, AND THAT CONCESSIONS OBTAINED ON
NATIONALITY ARE LIKELY TO BE AT THE EXPENSE OF FRG
INTERESTS.

5. GENERAL CONSIDERATIONS

AFTER DETAILED REVIEW OF BOTH DRAFTS, WE BELIEVE
THE GDR DRAFT RELIES TOO HEAVILY ON NON-SPECIFIC
ASSERTIONS OF PRINCIPLE WHICH WOULD, IF
APPLIED TO ACTUAL SITUATIONS, LEAD TO CONFLICTING
INTERPRETATIONS. WE BELIEVE THAT THE SPECIFICITY
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AND PRECISION FOUND IN THE U.S. DRAFT GIVE US WHAT
WE NEED REGARDING DUAL NATIONALITY, CONSULAR ACCESS
AND DEFINITION OF FUNCTIONS OF CONSULAR POSTS. (SEE
BERLIN 5191 FOR OUR VIEWS ON NATIONALITY.) EVEN ON
THOSE MATTERS OTHER THAN NATIONALITY WHERE THE GDR
MAKES REFERENCE TO LOCAL LAW, WE BELIEVE THERE ARE
RISKS TO U.S. INTERESTS. THE U.S. WOULD NEED TO BE
ASSURED, INsofar AS POSSIBLE, THAT IN A CONFLICT
BETWEEN ANY CONVENTION AND GDR LAW THE PROVISIONS
OF THE CONVENTION WOULD BE SUPPERIOR.

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6.DUAL NATIONALITY

WE RECOGNIZE THAT THE U.S. NEEDS PRECISE ASSURANCES ON DUAL NATIONALITY TO GIVE US CONSULAR OFFICERS ACCESS, REPRESENTATION AND DOCUMENTATION RIGHTS TO ALL AMERICAN CITIZENS HERE, REGARDLESS OF WHETHER THEY ARE CONSIDERED BY THE GDR AS GDR CITIZENS BY THE OPERATION OF THAT COUNTRY'S LAWS. WE BELIEVE A SUBSTANTIAL NUMBER OF DUAL NATIONALITY CASES WILL EMERGE HERE OVER THE NEXT FEW YEARS. WE BELIEVE AS A MATTER OF PRINCIPLE THAT SUCH RIGHTS MUST BE UNFETTERED. THUS, THE REFERENCES TO LOCAL LAW IN ARTICLES 27, 29, 30 AND 42 OF THE GDR DRAFT POSE SPECIAL DIFFICULTIES FOR US. UNDER THE DUAL NATIONALITY RUBRIC, SEVERAL POSSIBILITIES ARE THEORETICALLY OPEN TO US:

A. WE CAN ACCEPT THE IMPRECISION OF THE GDR DRAFT AND TRY TO MAKE A ONE-SHOT DEAL ON THE HUMANITARIAN CASES WE ARE NOW AWARE OF AS A TRADE-OFF;

B. WE CAN DRAG THE NEGOTIATIONS OUT UNTIL, WE HOPE, THE GDR TIRES AND GIVES US SOME OR ALL OF WHAT WE WANT;

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C. WE CAN VIEW THIS ISSUE AS ONE OF THE KEY ONES
AND HOLD OUT FOR SUBSTANTIVE GAINS WHILE USING GDR
INTEREST IN THE "NATIONALITY" QUESTION AS A LEVER TO
OBTAIN CONCESSIONS; OR

D. WE CAN BE ADAMANT ON THIS ISSUE AND REFUSE TO
ACCEPT LESS THAN EVERYTHING WE WANT ON DUAL NATIONALITY.

7. CONSULAR ACCESS

THE LANGUAGE IN ARTICLE 36 OF THE GDR DRAFT AND THE
SEPARATE PROTOCOL ON CONSULAR ACCESS TO AMERICANS
JAILED OR IN PRISON IS UNSATISFACTORY BECAUSE IT IS
TOO GENERAL, RELIES TOO HEAVILY ON IMPLEMENTATIONS
UNDER GDR LAW, AND, IN THE CASE OF THE PROTOCOL,
SEPARATES IMPORTANT OPERATIVE FEATURES FROM THE
CONVENTION ITSELF. (WE NOTE, HOWEVER, THAT EVEN IN
CONVENTIONS WITH SOCIALIST STATES SEPARATE PROTOCOLS
ARE USUALLY CONCLUDED.) HERE THE RISK IS THAT, IN A
CONFLICT BETWEEN THE CONVENTION AND LOCAL LAW, THE
DECISION WOULD GO AGAINST THE TREATY RIGHT. WE KNOW
LITTLE ABOUT GDR JUDICIAL DECISIONS OR RULINGS OF THEIR
ADMINISTRATIVE ORGANS. UNTIL WE PIN THIS DOWN IN MORE
DETAIL, WE BELIEVE THE U.S. CANNOT RELY ON LOCAL LAW
AS THE BASIS FOR IMPLEMENTATION OF TREATY RIGHTS.
(THE GDR CAN COUNT ON THE SUPERIORITY OF TREATY LAW
TO MUNICIPAL LAW IN THE U.S. BECAUSE THIS IS
GUARANTEED IN THE CONSTITUTION.) WE NEED DETAILED
SPELLING-OUT OF PRISON VISITATION RIGHTS, ATTENDANCE
AT TRIALS, AND LANGUAGE OF COMMUNICATION AND CONSULAR
ACCESS TO TRIALS, PARTICULARLY IN CASES OF DUAL
NATIONALS. WE PARTICULARLY SHOULD NOT ACCEPT A DIS-
TINCTION BETWEEN SECURITY AND OTHER OFFENSES WITH
THE FORMER CASES BEING TRIED IN CAMERA, UNLESS WE
WANT TO OBTAIN THE SAME RIGHT.

8. NEGOTIATING TACTICS

WITHIN THE OPTIONS WE HAVE SET OUT ABOVE, THE FOLLOWING
APPEAR TO BE SOME RELEVANT TACTICAL CONSIDERATIONS. FROM
THE OUTSET, WE SHOULD DISPLAY A BUSINESSLIKE AND
PRAGMATIC ATTITUDE TOWARD THE FEBRUARY ROUND. THE GDR
NEGOTIATORS ARE COMING TO WORK, AND WE SHOULD MATCH
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THEM. THEY GIVE EVIDENCE OF HAVING DONE THEIR HOMEWORK
AND OF HAVING PREPARED FOR THESE NEGOTIATIONS WITH
GREAT CARE. CHIEF GDR NEGOTIATOR KLOBES AND HIS TEAM
ARE ACCUSTOMED TO WORKING TOGETHER. THEY HAVE HAD
THE BENEFIT OF A PREVIOUS ENCOUNTER WITH WESTERN
VIEWS IN THEIR NEGOTIATIONS WITH THE BRITISH (BERLIN

5124 AND 5165).

WE WILL BEST BE SERVED BY HAVING OUR OWN CLEAR VIEWS
AS TO WHAT WE WANT AND DO NOT WANT IN THESE NEGOTIATIONS.
WE SHOULD MAKE IT CLEAR TO THE EAST GERMANS THAT WE
NEGOTIATE AD REFERENDUM, AND THAT NOTHING IS AGREED
UNTIL ALL IS AGREED. WE SHOULD DECIDE WHAT OUR
RESPONSE WILL BE TO THE LIKELY GDR PROPOSAL THAT WE
AGREE ON AS MUCH AS POSSIBLE AS EARLY AS POSSIBLE, LEAVING
SUCH CONTENTIOUS ISSUES AS NATIONALITY UNTIL THE END.
THE EMBASSY RECOMMENDS AGAINST OUR SUGGESTING, OR
ACCEPTING, LINKAGE BETWEEN PROGRESS IN THE CONSULAR
CONVENTION NEGOTIATIONS AND SUCH OTHER BILATERAL ISSUES
AS THE RESOLUTION OF HUMANITARIAN CASES.

9. CONCLUSIONS AND RECOMMENDATIONS

(A) DUAL NATIONALITY - WE BELIEVE THAT OPTION (C)
OF THE SECTION ON DUAL NATIONALITY, ENVISAGING AS IT
DOES A TANDEM APPROACH WITH OUR APPROACH ON
"NATIONALITY", IS THE MOST USEFUL AND SHOULD BE ADOPTED.
THE QUID PRO QUO ON HUMANITARIAN CASES WOULD BE
DISADVANTAGEOUS TO OUR LONG-TERM CONSULAR INTERESTS,
AND OPTION (D) COULD FREEZE OUT THE NEGOTIATIONS AT
THE VERY BEGINNING. OPTION (B) --WAITING OUT THE EAST
GERMANS--WOULD, WE BELIEVE, BE MEETING THE GDR TEAM
ON GROUND MOST FAVORABLE TO THEM.

(B) CONSULAR ACCESS-OUR OPTIONS HERE ARE LIMITED.
THIS SUBJECT, TOGETHER WITH DUAL NATIONALITY, LIES
AT THE HEART OF OUR CONCERNS IN THIS CONVENTION. THE
CONNECTION EXISTING BETWEEN NATIONALITY AND DUAL
NATIONALITY DOES NOT EXTEND TO CONSULAR ACCESS. THIS
IS A SUBJECT ON WHICH THE U.S. CANNOT ACCEPT INADEQUATE
COMPROMISE LANGUAGE. THE U.S. DRAFT ON CONSULAR ACCESS
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